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Supreme Court of the United States

OCTOBER TERM, 1997

AT&T CORP., *et al.*
Petitioners,

v.

IOWA UTILITIES BOARD, *et al.*,
Respondents.

AT&T CORP., *et al.*,
Petitioners,

v.

CALIFORNIA, *et al.*,
Respondents.

On Writs of Certiorari to the
United States Court of Appeals
for the Eighth Circuit

REPLY BRIEF OF PETITIONERS AT&T *et al.* IN NO. 97-826 AND BRIEF OF CROSS-RESPONDENTS IN NOS. 97-1075, 97-1087, 97-1099, AND 97-1141

MARK C. ROSENBLUM
ROY E. HOFFINGER
295 North Maple Avenue
Basking Ridge, NJ 07920
(908) 221-3539

DAVID W. CARPENTER*
PETER D. KEISLER
DANIEL MERON
SIDLEY & AUSTIN
One First National Plaza
Chicago, IL 60603
(312) 853-7237

Counsel for AT&T Corp.

[Additional Counsel Listed on Inside Cover]

June 17, 1998

* *Counsel of Record*

61 PP

DANA FRIX
SWIDLER & BERLIN
3000 K Street, NW
Suite 300
Washington, DC 20007
(202) 424-7500
Counsel for ACC Corp.

CHARLES H. HELEIN
ROBERT M. MCDOWELL
HARISHA J. BASTIAMPILLAI
HELEIN & ASSOCIATES, P.C.
8180 Greensboro Drive
Suite 700
McLean, Virginia 22102
(703) 714-1300
Counsel for America's Carriers Telecommunications Association

GENEVIEVE MORELLI
1900 M Street, NW
Suite 800
Washington, DC 20036

ROBERT J. AAMOTH
EDWARD A. YORKGITIS, JR.
KELLEY DRYE & WARREN LLP
1200 19th Street, NW
Suite 500
Washington, DC 20036
(202) 955-9600
Counsel for Competitive Telecommunications Association

JAMES M. SMITH
Vice-President-Law and Public Policy
3000 K Street, NW
Suite 300
Washington, DC 20007

DANA FRIX
RUSSELL M. BLAU
SWIDLER & BERLIN
3000 K Street, NW
Suite 300
Washington, DC 20007
(202) 424-7500
Counsel for Excel Telecommunications, Inc.

JAMES R. JACKSON, JR.
GENERAL COMMUNICATIONS, INC.
2550 Denali Street
Suite 1000
Anchorage, AK 99503
(907) 265-5545
Counsel for General Communications, Inc.

LEON M. KESTENBAUM
JAY C. KEITHLEY
H. RICHARD JUHNKE
1850 M Street, NW
11th Floor
Washington, DC 20036
(202) 828-7437
Counsel for Sprint Corporation

CHARLES C. HUNTER
CATHERINE M. HANNAN
HUNTER COMMUNICATIONS
LAW GROUP, P.C.
1620 I Street, NW
Suite 701
Washington, DC 20006
(202) 293-2500
Counsel for
Telecommunications Resellers
Association

CATHERINE R. SLOAN
RICHARD L. FRUCHTERMAN, III
RICHARD S. WHITT
1120 Connecticut Avenue, NW
Suite 400
Washington, DC 20036
(202) 776-1550
Counsel for WorldCom, Inc.

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Respondents and cross-petitioners confirm that the FCC had jurisdiction to adopt its pricing and other rules and that each of the challenged local competition rules is substantively valid. In particular, when their briefs are stripped of their rhetoric, they are challenging the FCC's rules by (1) ignoring the nature of the facilities and services that the rules address, (2) misstating the express terms of the Communications Act, and (3) relying on "policies" that Congress did not enact and that respondents' positions would not advance.

I. THE FCC HAS JURISDICTION TO IMPLEMENT ALL THE ACT'S LOCAL COMPETITION PROVISIONS.

The respondents' briefs have defended the Eighth Circuit's jurisdictional holdings by misstating the bases of the FCC's authority and the terms of the Act. In particular, contrary to respondents' assertions, petitioners are not claiming that the FCC has jurisdiction because "Congress would *never* pass a communications statute without intending the FCC to superintend every aspect." Bell Atl. Br. 29.

Rather, the point is that, in contrast to other provisions enacted by the Telecommunications Act of 1996, Congress deliberately codified the new local competition provisions as §§ 251-76 of the Communications Act. See AT&T Br. 22 & n.12. By doing so, Congress gave the FCC authority to "execute and enforce" these new provisions (47 U.S.C. § 151), to "prescribe such rules and regulations as may be necessary to . . . carry out the provisions," (*id.* § 201(b)), and otherwise to enforce them. *Id.* §§ 154(i), 208, 303(r). Moreover, § 251(d)(1) mandated that the FCC adopt regulations implementing the requirements of § 251 within six months of its enactment and before the States conclude the arbitration

decisions that are reviewable only in federal district court and under federal law.

Further, it is simply not the case that the FCC's rules under §§ 251-252 intrude on the States' historic jurisdiction over "intrastate services." In particular, contrary to respondents' repeated assertions, the facilities and arrangements at issue will be used to provide not just retail "intrastate services," but also "exchange access" services that are overwhelmingly "interstate services" that the FCC has regulated for 60 years. Moreover, as no party disputes, the original Communications Act of 1934 gave the FCC jurisdiction over rates, terms, and conditions in which customers lease the same local loops and other associated facilities that will here be used for interstate as well as intrastate calls (AT&T Br. 5-6 & n.3). The FCC's rules thus exercise the jurisdiction over leased facilities that the FCC always had, while implementing new resale and transport arrangements that are provided in conjunction with the leased facilities.

For these reasons, respondents have primarily devoted their briefs to defending only the Eighth Circuit's holding that the FCC lacks jurisdiction over the pricing provisions of the Act, and to arguing only that § 252(c) expressly denies the FCC jurisdiction over the pricing requirements of §§ 251-52 that it otherwise would have. But the FCC would have jurisdiction over these pricing and other requirements of §§ 251 and 252 even if respondents' reading of § 252(c) were a possible one -- as it is not.

A. Section 201(b) Gives The FCC Jurisdiction Over All The Act's Requirements.

Because § 201(b) authorizes the FCC to adopt rules to carry out each provision of the Communications Act, its terms authorize the FCC to adopt rules to implement all the pricing and other requirements of the Act, including the provisions of

§ 252(c) that are claimed (erroneously) to require states to establish prices solely under the standards of § 252(d). That is why the LEC and state commission respondents are reduced to contending (in arguments buried in the backs of their briefs) that § 201(b) cannot or should not mean what it plainly says.

Respondents' principal argument, again, is based on their assertions that the substantive requirements of the first sentence of § 201(b) do not apply to the services and facilities that § 251(c) requires LECs to provide. But even if that claim were correct, § 201(b) expressly grants the FCC rulemaking authority to implement the "provisions of this Act," and there is no basis for the claim that this authority can somehow be "limited to [the] interstate communication" purportedly addressed in the first sentence of this "section." GTE Br. 33; Bell Atl. Br. 43; States Br. 26-27. That is particularly so because other sections of the Act direct the FCC to adopt regulations implementing only the requirements of "this section" (*e.g.*, §§ 251(d)(1), 317(e)) and not the entire "Act."

The LECs also claim that Congress could not have intended to give the FCC the same § 201(b) rulemaking power over §§ 251-76 that it had over the original provisions of the Act and that "the FCC cannot pluck such a generalized term out of the 1934 Act" and apply it to the "1996 Act's" local competition provisions. GTE Br. 34. The reason, they say, is that this would "give the FCC intrastate jurisdiction denied to the agency by section 2(b)" and would mean that Congress "wasted its breath" when it adopted § 2(b). Bell Atl. Br. 43-44.

However, §§ 2(b) and 201(b) are each "generalized term[s] out of the 1934 Act." If § 201(b) and the other general grants of jurisdiction over all the Act's requirements were somehow inapplicable to §§ 251-76, then so, too, would be § 2(b). But because Congress deliberately codified the new local competition provisions in the Communications Act (AT&T Br.

22 n.12), the jurisdictional grant of § 201(b) and § 2(b)'s rule of construction each are applicable to §§ 251-76.

Contrary to the LECs' claims, there is also no conflict between § 2(b) and § 201(b), for § 2(b) places no limitation on § 201(b)'s express grant of rulemaking authority over the provisions of the Act. Rather, § 2(b) merely provides that no provision of the Act may be "*construed* to apply *or* to give the [FCC] jurisdiction" over intrastate services. Because the substantive requirement of §§ 251 and 252 unambiguously "apply" to intrastate matters, § 201(b) and the Act's other general provisions expressly grant the FCC the same jurisdiction over those intrastate matters addressed in §§ 251-52 as it has over the interstate services to which other provisions of the Act apply. No "constru[ction]" of the Act is required to "give" the FCC jurisdiction over the requirements of §§ 251-52. Thus, the effect of § 2(b) here, as elsewhere, is to bar the FCC from asserting "protective" jurisdiction (as the ICC had done in the *Shreveport Rate Cases*, 234 U.S. 342 (1914)) over those aspects of intrastate services to which provisions of the Act do not unambiguously apply (*e.g.* the retail rates that LECs and new entrants charge their customers). See MCI Br. 45, AT&T Br. 12 n.9.

For the same reasons, the States' and the LECs' reliance on *Louisiana Public Service Comm'n* v. *FCC*, 476 U.S. 355 (1986) is misplaced. It held only that where it was unclear whether a statutory requirement (there, depreciation schedules established under § 220) applies to intrastate services, § 201(b) does not authorize the FCC to adopt regulations applying that provision to intrastate services. In this regard, §§ 251-52 no more apply to establishing the *retail* rates charged to end users than did the provisions of § 220 of the Act that were construed in *Louisiana*, so §§ 251-52 do not alter *Louisiana*'s holding that the FCC has no jurisdiction over intrastate exchange and exchange access rates.

By contrast, because all concede that §§ 251-53 apply to the intrastate as well as the interstate aspects of the new *wholesale* arrangements that will enable new entrants to offer competing exchange and exchange access services, § 201(b) authorizes the FCC to adopt regulations implementing all the requirements of §§ 251 and 252, including the requirements of § 252(c)(2) and § 252(d) insofar as they govern the arbitration proceedings that states conduct. Congress here followed this Court's holdings that there is no inconsistency between granting ratemaking authority to a state tribunal and authorizing a federal agency to adopt rules prescribing the specific standards that States are to apply in establishing rates. *Wilder* v. *Virginia Hospital Assoc.*, 496 U.S. 498, 516 (1990).

B. Section 251(d)(1) Independently Establishes The FCC's Authority To Adopt Pricing As Well As Non-Pricing Rules.

Further, even if § 201(b) and the Act's other general provisions did not give the FCC rulemaking authority over all the requirements of §§ 251-76, the FCC's authority to adopt all its pricing and other local interconnection rules would be established by § 251(d)'s requirement that the FCC "establish regulations to implement the requirements of this section" by August of 1996. As previously explained (AT&T Br. 24-25), there is no substance to respondents' various efforts to argue that the phrase "the requirements of this section" can be read to mean "only the areas in § 251 where Congress explicitly called for the FCC's involvement." States Br. 20.[1]

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[1] Remarkably, respondents also simultaneously argue that "[b]y stating that the FCC must consider certain factors 'in determining what network elements should be made available,' [section 251(d)(2)] *itself* necessarily authorizes the FCC to make such a 'determination' in the first place." Bell Atl. Br. at 39. However, if the terms of § 251(d)(2) constituted a sufficiently clear grant of authority, then the virtually identical phrase in section 251(d)(3) -- "in

(continued...)

Respondents thus now claim that even if § 251(d)(1) established the FCC's authority to adopt rules to implement "the requirements of" § 251, the FCC cannot adopt pricing rules because pricing is addressed in § 252, not in 251. Bell Atl. Br. 34; GTE Br. 31. This claim is simply wrong. Section 251 requires incumbent LECs to charge (1) prices for interconnection and network elements that are "just, reasonable, and nondiscriminatory" (2) "wholesale" rates for resale, and (3) "just and reasonable" rates for co-location. §§ 251(c)(2),(3),(4),(6). By contrast, all § 252(d) does is supply statutory standards that limit the discretion of the FCC and the state commissions and that govern the setting of prices for *some* of these arrangements in arbitration proceedings. The FCC's pricing rules thus implement "requirements" of § 251.

However, because §§ 251(c)(2) & (3) incorporate the "requirements . . . of Section 252" by reference, GTE argues that a LEC's sole duty under § 251(c) is to charge the rates that state commissions establish under the requirements of § 252 and include in interconnection agreements.[2] GTE Br. 32. But this claim, too, is foreclosed by § 251(c)'s terms. Sections 251(c)(2) & (3) require LECs to charge rates that are "just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement [established under § 252] and the requirements *of this section* [251] *and* section 252." 251(c)(2) (emphasis added). Thus, § 251(c) imposes duties on LECs to charge rates that are just and reasonable and consistent with the

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[1] (...continued)
prescribing and enforcing regulations to implement the requirements of this section" -- would itself authorize the FCC to "prescribe" and "enforce" the "requirements of" section 251. Respondents cannot have it both ways.

[2] This is also the premise of the BOCs' equally erroneous claim that § 271 of the Act does not require the FCC independently to determine whether a BOC is charging prices that satisfy §§ 251 and 252(d) in ruling on applications for long distance authority. *See* Bell Atl. Br. 41-42.

requirements of § 251 and § 252(d) as well as with the interconnection agreements that state commissions establish in arbitrations. Further, as Bell Atlantic (Br. 35) correctly states, the provisions of § 251(c)(4) and § 251(c)(6) do not even refer to § 252. In short, § 251 plainly imposes pricing requirements that are independent of both § 252(d)'s standards and the specific pricing determinations that States make in arbitration proceedings.

C. The FCC's Authority To Adopt Pricing Rules Is Not Impliedly Repealed By § 252(c), But Is Confirmed Both By Its Terms And Those Of §§ 160, 253, And 271.

Next, respondents argue that even if §§ 151, 201(b), or 251(d) granted the FCC rulemaking authority over all the Act's local competition requirements, § 252(c) of the Act takes away the FCC's jurisdiction over pricing. They contend that § 252(c) "express[ly]" grants any State that elects to conduct arbitration proceedings the "exclusive" authority to construe the Act's pricing requirements in the first instance and frees them from following FCC pricing regulations. GTE Br. 34. However, § 252(c) does no such thing. To the contrary, it expressly provides that "[i]n resolving by arbitration . . . *any* open issues . . . a State commission *shall* (1) ensure that such resolution and conditions meet the requirements of section 251 of this title, *including the regulations prescribed by the Commission*"; [*and*] (2) "establish any rates . . . according to subsection (d)." § 252(c) (emphasis added). Because pricing issues are clearly among the "open issues" that state commissions must arbitrate, § 252(c) requires States to comply with both any pricing regulations that the FCC adopts and the standards of § 252(d).

Respondents' contrary claims all rest on an attempt to give § 252(c)'s terms a meaning that they cannot bear and that is foreclosed by numerous other provisions of the Act. In

particular, they claim that § 252(c) created a "clear dichotomy between pricing and other matters." Bell Atl. Br. 23. They assert that § 252(c)(1) requires States to comply with FCC regulations in resolving any open non-pricing issues, but that pricing issues are addressed "as a separate matter" in § 252(c)(2) which, respondents claim, requires that the states "solely" follow the standards contained in § 252(d). GTE Br. 28-29. Because § 252(d) "makes no mention of the FCC" (GTE Br. 29, 32), respondents claim that the States that choose to conduct arbitrations were granted the "exclusive" authority initially to interpret the federal pricing standards. However, the Act's terms and structure foreclose any claim that there is such a "dichotomy."

Section 252(c). First, respondent's claims are foreclosed by § 252(c)'s terms. The phrase "any open issues" cannot be limited to "non-pricing issues," for the phrase does not appear in § 252(c)(1). Rather, this phrase is contained in the preamble to § 252(c), and the States' duties in resolving any "open issues" are thus defined in *each* of § 252(c)'s three subsections. Conversely, § 252(c)'s language and structure forecloses the respondents' argument that the phrase "any open issues" can be read to mean only "any non-pricing issues" and that the States' duty to follow FCC regulations applies only to non-pricing issues. Indeed, because the phrase "any open issue" applies to § 252(c)(2), respondents' claims would render it absurd. The section would then provide that "in resolving any *non-rate* issues . . . a State Commission shall . . . (2) establish [] *rates*." As a matter of simple grammar, the phrase "any open issues" must include rate issues.

Second, contrary to respondents' arguments, § 252(c)(2) does not say that States are to follow "solely" the standards contained in § 252(d) when they establish rates. The word "solely" appears only in the LECs' brief and not in § 252(c)(2)'s terms. Indeed, the other provisions of the Act -- and

respondents' own concessions -- establish that § 252(c)(2) could not permit a State to establish rates "solely" based on the standards of § 252(d). As both the States and the LECs have conceded, there are at least some FCC regulations that States must follow in setting rates. For example, respondents concede (Bell Atl. Br. 38; States Br. 33) that the FCC has the exclusive authority to determine how LECs recover costs for numbering administration and number portability. See § 251(e)(2). As the Eighth Circuit recognized, the state commissions will have to comply with the FCC's rules that govern whether or how those costs are included in rates for network elements, interconnection, or resale. Otherwise, LECs would not recover these costs, or would recover them twice. Pet App. 89a-91a. Similarly, while the Act requires LECs to provide collocation at "just" and "reasonable" rates, § 252(d) provides no standards for establishing collocation rates. These and other pricing issues can thus only be governed by the terms of § 251 and the FCC's regulations under them.

Third, rather than prescribe that rates be determined "solely" under § 252(d)'s standards, Congress linked the requirements of § 252(c)'s subsections by the conjunctive "and." That demonstrates that the FCC had it exactly right. State commissions must resolve all open issues, including pricing issues, in a manner (1) that is consistent with whatever pricing regulations the FCC chose to adopt (§ 252(c)(1)) and (2) in the case of rates, that also comply with § 252(d)'s pricing standards. That is not a "tortured reading." GTE Br. 29. That is exactly what the language Congress wrote says.[3]

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[3] Similarly, GTE's claim (p. 29) that § 252(d) "conspicuously omits any mention of the FCC" is wrong. Section 252(d)(2)(B)(ii) explicitly mentions the FCC and further confirms Congress' understanding that both the FCC and the state commissions would have a role in construing § 252(d)'s language.

Similarly, this language does not render § 252(c)(2) and the pricing standards of § 252(d) "wholly superfluous." Bell Atl. Br. 24. These sections control the resolution of all ratemaking issues that are not addressed in FCC regulations. In this regard, the FCC pricing rules before the Court in fact did not address two of the three major components of ratemaking (cost of capital and depreciation), but left those for the States to determine under only the general standards of § 252(d) and § 251(d). Sections 252(c)(2) and 252(d) apply to the resolution of all such pricing issues.

Finally, there is no basis for respondents' claim that the "drafting history" of the 1996 Act establishes that Congress nonetheless intended a "clear dichotomy" in which "pricing" was committed to the States under the standards of § 252(d) and FCC regulations governed only non-pricing issues. Bell Atl. Br. 24-25. In particular, they contend that the Senate Bill on which §§ 251 and 252 were based did not contain this "dichotomy," but would have required States to follow FCC regulations in setting rates (States Br. 25; Bell Atl. Br. 24; GTE Br. 30). But they assert the Conference Committee amended the bill to create a "clear dichotomy" between rate and non-rate issues. This contention, too, is baseless. Like § 252(c), the Senate Bill had one subsection (§ 251(d)(5)) requiring States to resolve all open issues in accord with FCC regulations[4] and a separate subsection (§ 251(d)(6)) that directed States to

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[4] Section 251(d)(5) of the Senate Bill, entitled "Action by State," provided that "In resolving any open issues and imposing conditions upon the parties to the agreement, a State shall ensure that [those requirements and conditions] are . . . consistent with the Commission's rules defining minimum standards." S. 652, 104th Cong. § 101 (1995), *reprinted in* S. Rep. No. 104-23, at 92.

establish rates also under the standards now codified in § 252(d).[5]

Sections 160, 253 and 271. That §§ 252(c)(2) and 252(d) do not repeal the FCC's authority over local pricing requirements is also vividly confirmed by other terms of the Act. First, § 160 expressly authorizes the FCC to forbear "from applying the requirements of section 251(c)" (§ 160(d)) only "if the Commission determines that (1) enforcement of [section 251(c)] is not necessary to ensure that the *charges* . . . for, or in connection with that . . . service are *just* and *reasonable*." § 160(a) (emphasis added). Section 160 thus presumes that the FCC will construe § 251(c)'s pricing requirements.

Contrary to respondents' claim (GTE Br. 36), petitioners made this argument below, and the Eighth Circuit rejected it by making the same claim that the state commissions and GTE now advance: that § 160(a) refers to "charges" "to ensure that the new regulatory forbearance measure would apply to all the charges for interstate service that the FCC has long controlled." *Compare* GTE Br. 37 & States Br. 27 *with* Pet. App. 86a. That argument, however, ignores that Congress expressly directed the FCC to apply § 160(a)'s standards in determining whether to forbear from enforcing "the requirements of § 251(c)." § 160(d). The only "charges" that would be relevant to that determination would be the charges for the facilities and services provided under § 251(c).

The BOCs thus try a different tack. They argue that § 160 authorizes the FCC to forbear from applying only the non-pricing requirements of § 251(c), and does not imply that the

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[5] Section 251(d)(6) of the Senate Bill, entitled "Charges," provided pricing standards virtually identical to those in 252(d)(1) that were to be applied whenever rates were "determined by arbitration," and made no reference to FCC regulations. *Id.*

FCC has "pricing jurisdiction." Bell Atl. Br. 41 n.22. But the BOCs, too, ignore that § 160(d) itself provides that the FCC may only forbear from enforcing § 251(c) if the FCC "determines" that the "charges" will be "just" and "reasonable." Congress could not have authorized the FCC to make that determination if it has no "role" to play in defining § 251(c)'s pricing requirements. Bell Atl. Br. 21.

Respondents likewise fail to reconcile their jurisdictional claims with § 271 and § 253. Section 271 expressly authorizes the FCC to determine the lawfulness of BOC prices in ruling on applications for long distance authority. See p. 6 n.2, *supra*. Section 253 further authorizes the FCC to "preempt" any state "order" or "requirement" whose "effect" is to create a "barrier[] to entry." § 253. Respondents do not deny that the FCC can exercise its § 253 authority to preempt state pricing requirements that have the effect of barring entry. Nor could they. A "barrier to entry" is classically defined as any condition which requires new entrants to bear costs greater than those borne by the incumbent (see R. Posner, *Economic Analysis of Law* 312 (1992)), and a State's pricing methodology that imposed excessive costs on new entrants would fall squarely within that definition. Indeed, the FCC's pricing rules rest on that very finding. J.A. 147-162 (¶ 704-723). Thus, respondents argue that § 253 authorizes the FCC to preempt state orders only through adjudication, and not rulemaking. Bell Atl. Br. 40-41; States Br. 28; GTE Br. 36. But that argument is wrong as a matter of administrative law. FCC Br. 24. More fundamentally, it misses the point. Once it is acknowledged that § 253 authorizes the FCC to preempt state pricing rules through either rulemaking *or* adjudication, the FCC cannot be denied pricing jurisdiction under §§ 251 and 252 in order to "leave[] the traditional federal-state division wholly intact." Bell Atl. Br. 28.

D. Section 2(b) Does Not Deprive the FCC of Jurisdiction Over The Pricing Requirements.

Finally, respondents alternatively argue that § 2(b) "prohibit[s] the FCC from adopting rules" implementing the Act's pricing standards. States Br. 30. However, respondents concede that § 2(b) is simply a rule of "construction" that is overcome by "straightforward" language that grants the FCC jurisdiction to regulate intrastate matters (States Br. 32, Bell Atl. Br. 28). The local competition provisions of §§ 251 and 252 concededly "apply" to "intrastate" matters, and the other terms of the Act (*e.g.*, §§ 201(b) & 251(d)(1)) are even more "straightforward" and unambiguous in "giving" the FCC "jurisdiction" over all the pricing and nonpricing requirements of these sections. *See* pp. 2-7, *supra*.

In addition, respondents are wrong in repeatedly asserting that LECs' provision of the network elements, interconnection, and other arrangements addressed in § 251(c) are "intrastate services." As petitioners' opening brief explained in detail and as no respondent denies, it was well-established prior to the 1996 Act's amendments to the Communications Act that the FCC has *exclusive* jurisdiction to set the rates and other terms by which customers obtained local loops -- and other dedicated facilities -- that the customer then used to complete both interstate and intrastate calls. AT&T Br. 5-6, 28. For example, while § 2(b) divides authority to regulate finished *services* along inter- and intrastate lines, a different rule applies when a customer leases local loops and capacity from a carrier to be used by the customer in creating a "private network." The rates for that equipment and capacity were set exclusively by the FCC whenever that network was used to complete even a single

interstate phone call.[6] Contrary to Bell Atlantic's statement (Br. 15, 30), it is not merely the case that "some" courts of appeals upheld this FCC jurisdiction. This jurisdiction was affirmed by every court of appeals decision that addressed the issue before the 1996 Act was passed, and this Court cited this line of authority with approval in *Louisiana*, 476 U.S. at 375-76 n.4.

The interconnection arrangements required by §§ 251-52 include precisely the same facilities whose rates and other terms the FCC has thus long regulated as "private lines." For example, purchasers of combinations of network elements, like the private line customers, lease local loops and associated switches and transmission capacity at a single price and use them to provide interstate as well as intrastate service. That does not mean the 1996 Act was not needed. Bell Atl. Br. 32. It means that the provision of the Act that alters the division of state and federal authority is § 253, which authorizes customers to use facilities leased under FCC regulations to provide retail services in competition with LECs. Further, while the LECs correctly state that other features of the interconnection arrangements required by § 251 (*e.g.*, wholesale services for resale and transport and termination) are generally now used only for intrastate services (Bell Atl. Br. 31), §§ 251-52 require that they be offered in conjunction with the network elements, interconnection, and co-location arrangements over which the FCC has always had exclusive pricing jurisdiction.

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[6] Like other federal agencies (*see Arkansas Elec. Coop. Corp.* v. *Arkansas PSC*, 461 U.S. 375, 383-84 (1983)), the FCC can choose to defer to state regulation. *See New York Telephone Co.* v. *FCC*, 631 F.2d 1059 (2d Cir. 1980); *Diamond Int'l Corp.* v. *FCC*, 627 F.2d 489 (D.C. Cir. 1980). Contrary to California's suggestions (Br. 44), that is what the FCC did when it followed the recommendation of the joint federal-state board and decided no longer to exercise its jurisdiction where fewer than 10% of the calls over a private line network were interstate. *MTS*, 4 FCC Rcd. 5660 (1989).

Respondents also make extended arguments that it is theoretically possible to "separate" the prices for access and interconnection into interstate and intrastate components -- with the FCC regulating them insofar as the facilities were used for interstate calls and the States setting the rates for the intrastate use of those facilities. Bell Atl. Br. 33. These claims are beside the point. Whatever alternative regime Congress might have theoretically been able to enact, §§ 251-52 provide that one set of rates would be established by one arbitrating body, and that those rates would apply to both the interstate and intrastate uses of the equipment and services at issue. That is why not a single commenter before the FCC, including the state commissions, could contend that "the FCC's role is to establish rules for only the interstate aspects of interconnection, and the states' role is to arbitrate and approve only the intrastate aspects of interconnection agreements." Pet. App. 194a-195a (¶ 92).

In sum, Congress enacted a statutory scheme over which the FCC had clear rulemaking authority under settled interpretations of § 201(b) and § 2(b). That is so both because all the Act's local competition requirements are codified in the provisions of the Communications Act over which the FCC has jurisdiction and because they apply to interstate as well as intrastate aspects of local loops and other facilities that customers obtain on an "unseparated" basis: that is, under a single set of rates applicable to the facilities as a whole. Indeed, Congress removed any doubt on the subject by providing that "[n]othing in this section shall be construed to limit or otherwise affect the Commission's authority under section 201 of this title." 47 U.S.C. § 251(i). Thus, the Eighth Circuit's judgment should be reversed both insofar as it vacated FCC rules on jurisdictional grounds and insofar as it vacated other rules on the false premise that the FCC had authority only to interpret six subsections of § 251 and not the authority under § 201(b) to

adopt whatever rules are reasonably necessary to "carry out" § 251's requirements.[7]

II. THE FCC RULES REQUIRING INCUMBENTS TO PROVIDE NONDISCRIMINATORY ACCESS TO COMBINATIONS OF NETWORK ELEMENTS ARE ALL VALID.

Section 251(c) establishes three potential modes of competitive entry: (1) constructing an alternative local network and interconnecting with the LEC under § 251(c)(2); (2) providing service through LEC network elements under § 251(c)(3); and (3) reselling LECs' retail services under § 251(c)(4). However, here, as in the Eighth Circuit, the LECs have focused virtually their entire litigation effort on challenging the FCC rules that govern the provision of combinations of network elements under § 251(c)(3). That is because these rules provide the only realistic near-term opportunity for broad-based competition to their monopolies and is essential to widespread future construction of alternative local networks that could create even greater benefits for consumers.

The reality is that any attempt now to construct alternative facilities of any significant scope would be prohibitively expensive and otherwise infeasible for even the largest new

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[7] Respondents do not dispute AT&T's showing (Br. 32-34) that the Eighth Circuit's jurisdictional holdings meant that it did not apply the standards of § 201(b) in reviewing FCC rules that were not adopted as interpretations of these six subsections. However, they claim that AT&T did not present this issue in its Petition for Certiorari. *E.g* Bell Atl. Br. 46 n.27. That is false. *See* Pet. Cert. i (Question Presented) ("Whether . . . the FCC's authority over the remaining non-pricing requirements is limited to adopting narrow interpretative rules?"); 9-10 (discussing the portions of the Eighth Circuit's opinion invalidating these rules on this basis); 13 (stating the Eighth Circuit's erroneous standard of review was one of two consequences of its erroneous jurisdictional holding).

entrants.[8] Nor does resale pose any serious competitive threat to the LECs' monopolies. The reseller may provide only the precise retail services the LEC already provides. It cannot provide the exchange access services that generate some 35% of local service revenue, and it cannot offer innovative new or other retail services that the LEC chooses not to provide. Further, resale has no effect on the LECs' monopoly profits, for the price the LEC will charge the reseller under the Act is equal to its retail price for the service minus whatever costs it avoids by acting as a wholesaler rather than a retailer. See § 252(d)(3). Resale thus protects the supracompetitive prices the LECs presently charge, precludes new entrants from providing the full range of services that LECs offer, and presents no meaningful opportunities for competitive innovation or differentiation.

Section 251(c)(3), by contrast, authorizes a new entrant to lease components of the LECs' networks at their full economic cost (including a full return on LEC investment) and to use those elements to provide any wholesale exchange services or other retail services the elements will support. This allows entry into the entire local service market, and creates genuine opportunities for competition on service quality, on innovation, and on price. Combinations of network elements have been referred to as "the platform" because they allow new entrants

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[8] *See Local Competition*, 11 F.C.C.R. 14171, 14175 (1996) (it would cost $29 billion to construct even the local facilities needed to reach only 20% of the 117 million access lines served by the BOCs). Thus, while the LECs repeatedly invoke the "facilities-based" local competitors who praised the Eighth Circuit's ruling (Bell Atl. Br. 60-61, 63-64; Ameritech Br. 38-39), these carriers have constructed only limited facilities and compete with the LECs only in the narrow high-volume niche markets where alternative facilities are economically feasible to provide exchange access and related services that are overwhelmingly used by large corporations. These carriers have no plans to engage in more broadbased competition, and it is neither surprising nor relevant that they would oppose the use of combinations of network elements that would lead to competition both in their niche markets and in other local services. *See also* ALTS Opposing Brief.

not only to provide alternatives to LECs' existing services, but also to provide new services by using the capabilities of the network elements in new ways or through facilities of their own that they connect to the network elements obtained from the LEC.

Further, while resellers obtain wholesale services at rates that reflect any subsidies (Bell Atl. Br. 8-9), § 254 requires users of network elements to make the same contributions to universal service as does the LEC or any carrier who has constructed an alternative network. Users of combinations of network elements thus will face the same costs or equivalent costs as the LEC with which they compete. They thus can have an adverse effect on the LEC only if it is charging monopoly prices for business services, exchange access, Caller ID, and other services that allegedly fund universal service -- *i.e.*, prices that exceed the sum of the costs LECs incur in providing the service and of any implicit or explicit subsidies necessary to support below-cost rates for rural or other customers.

The LECs have thus urged proposals whose sole purpose and effect would be to render network element competition economically or practically infeasible. Indeed, the LECs do not dispute that they are seeking authority to engage in discrimination by tearing apart existing combinations of network elements or by engaging in other conduct that would impose unnecessary costs solely on new entrants, degrade any services new entrants offer, allow LECs to "gate" the rate of competitive entry, and thereby protect LECs' monopoly rates. The LECs' two principal claims are that the Court should (1) uphold the Eighth Circuit's decision to invalidate Rule 51.315(b) on the ground that LECs are entitled to "unbundle" network elements by physically disconnecting them from one another, or (2) reverse the Eighth Circuit's holding that LECs may not limit the right to purchase network elements to those new entrants that have constructed some unspecified local exchange facilities of

their own. The LECs profess genuine indifference as to which extrastatutory mechanism the Court adopts to make § 251(c)(3) infeasible so long as it adopts at least one. See, *e.g.*, Ameritech Br. 22-41.

The LECs make no serious effort to argue that any of their proposed limitations is permitted, much less required, by the text of § 251(c)(3). Indeed, they urge the Court not to examine their textual and other legal arguments "in isolation" -- which GTE (pp. 51-52) calls applying *Chevron* "on an 'unbundled basis.'" Instead, the LECs argue that their crippling interpretations of § 251(c)(3) are necessary to achieve three supposed non-textual objectives of Congress: (1) preserving a separate role for the resale authorized by § 251(c)(4), (2) protecting universal service by barring firms from providing cost-based service to high-end customers and using resale to serve customers who receive subsidies, and (3) promoting facilities-based competition to the exclusion of all else. But none of these were objectives of Congress, and the LECs' proposals would not advance them even if they were.

Yet, these "policy" claims are the premise for each of the LECs' proposed interpretations of individual terms of § 251(c)(3) and other interrelated provisions of the Act. We will thus address them before discussing the LECs' individual statutory claims.

A. The Challenges To The Network Element Rules Rest On "Congressional Objectives" That Congress Did Not Have And That The LECs' Positions Would Not Advance.

The crippling interpretations of § 251(c)(3) cannot be justified by any of the three alleged statutory objectives that the LECs have hypothesized. Their specific claims not only are

unfounded when examined individually, but also contradict one another.

1. Combinations of Network Elements Are Not The Equivalent of Resale And The FCC's Rules Preserve Resale As A Meaningful Option.

The fundamental premise of the LECs' argument is that a competitor that purchases a combination of all network elements under § 251(c)(3) obtains the "identical product" as the competitor that purchases services for resale under § 251(c)(4). Bell Atl. Br. 60; see also Ameritech Br. 2, 26 (combination of network elements is "identical to what an entrant acquires when purchasing resale services"). The LECs therefore argue that, since different pricing and other rules apply to network elements and services purchased for resale, the FCC cannot have been correct in interpreting the Act to permit new entrants to purchase an "identical product" under either set of rules. The Eighth Circuit adopted this approach when it held that Congress permitted LECs to disconnect network elements in order to distinguish network elements from resale and thereby "preserve resale as a meaningful alternative." Pet. App. 56a.

But the LECs' premise is false. Because their rhetorical style is to assert disputed propositions as if they were accepted truth and not even to defend them, a reader of their briefs could not know that this precise issue was the subject of detailed findings by the FCC which rejected the LECs' assertion on the basis of a well-developed record. Pet. App. 234a-249a (¶¶ 317-341). The LECs do not acknowledge the FCC's findings or analysis, much less attempt to show that they were "arbitrary" or not based on "substantial evidence." 5 U.S.C. § 706.

As those findings make explicit, combinations of network elements are not remotely "the same" as wholesale services

obtained for resale. Carriers purchasing access to network elements obtain different things at different prices, provide different services, and assume different and greater burdens and business risks than resellers. Pet App. 244a (¶ 331) (purchasers of network elements face "different opportunities, risks, and costs in connection with entry into local telephone markets").

First, the statute itself establishes that purchasers of network element combinations under § 251(c)(3) obtain neither the "same retail services" (Ameritech Br. 16) nor the "same facilities" (*id.*) as purchasers of services for resale under § 251(c)(4). A LEC's obligation to make services available for resale is limited to the exchange or other services that the LEC in fact provides "at retail to subscribers who are not telecommunications carriers." § 251(c)(4). Network elements, by contrast, may be used -- either by themselves or in combination with the new entrant's "back office" or other facilities that it connects to them -- to provide any "telecommunications service." § 251(c)(3). In contrast to resellers of LEC retail services, users of network elements can thus provide any service within the capabilities of those facilities. They allow services that cannot be offered under § 251(c)(4) either because the LEC does not provide the services at all or because the LEC does not provide the services "to subscribers who are not telecommunications carriers."

Thus, for example, a new entrant purchasing network elements will compete in the entire local services market, including competing against the LEC's intrastate and interstate exchange access services -- the origination and termination of long distance calls -- that generate $35 billion in annual LEC revenues. A reseller cannot purchase such services for resale because they are provided to long-distance companies, not to "subscribers who are not telecommunications carriers." § 251(c)(4). Pet. App. 245a (¶ 333). And the provision of originating and terminating access requires capital investment

(by both the LEC and the new entrant) in facilities that bill and collect for exchange access services that resellers never need or pay for. Notably, these are investments that the new entrant must make before it begins providing service to its first retail customer, and that will not be recovered if the entrant is not successful in winning a sufficient number of customers with a sufficient volume of outgoing and incoming long distance usage.

In addition to exchange access services, a new entrant using network elements can use them to develop retail offerings that the LECs may have chosen not to offer, but that the network elements will support. Pet. App. 244a-245a (¶ 333); J.A. 108 (¶ 495). Resellers, by contrast, are confined to offering precisely the same services as the LEC. Although they can place competitive pressure on the LEC by, for example, being more solicitous to customers, they cannot differentiate the underlying service. Pet. App. 244a (¶ 332).

Moreover, because purchasers of network element combinations may use the LECs' network elements to create and provide advanced new services that the LECs do not themselves offer, they do not merely obtain use of the "same facilities" that the LECs use to provide services to resellers, but access additional LEC facilities as well. For example, network element competitors are entitled to access the hardware and software in a LEC's "service creation environment" (SCE) to "design, create, [and] test" such new services. J.A. 108-09 (¶ 495). The SCE is not used, however, when those new services are subsequently provided to customers -- other LEC systems fulfill that function (*id.*) -- so LECs do not employ the SCE when they provide services to resellers.

Given the substantial differences between network element competitors and resellers in what they obtain and how they use it, the Eighth Circuit engaged in a fundamentally misdirected "apples and oranges" analysis when it sought to determine, as

the LECs urged, whether the FCC's interpretation of the statute would leave network elements with sufficient "disadvantages [to] preserve resale as a meaningful alternative." Pet. App. 56a. Congress created different entry vehicles to give new entrants a range of opportunities. It could not and did not prejudge which mode of entry the market would find most attractive, and certainly did not seek to load down one vehicle with "disadvantages" in order to assure that another would be frequently used.

In all events, contrary to the LECs' main argument and the Eighth Circuit's holding, it is plain that granting new entrants access to combinations of some or all network elements would *not* lead the resale vehicle to fall into disuse -- as the FCC expressly found. Pet. App. 243a-244a (¶ 331). There are several contexts in which new entrants will find resale the most appropriate entry vehicle -- such as where particularly fast or easy entry into a market is desired, where a new entrant's business plan only involves providing a small range of services, where a new entrant can offer customers lower rates by aggregating multiple customer volumes onto a LEC volume discount plan, or where customers may be being served by the incumbent LEC at subsidized rates. Thus, even before the Eighth Circuit invalidated Rule 51.315(b), although the competitive exchange services that were being offered were small in scope (as they are now still), the overwhelming majority of them were offered through resale.

Indeed, the LECs' other arguments confirm that the resale vehicle will continue to be used, for they contend that competitors will engage in "arbitrage" by using resale to serve customers who today receive subsidies. Thus, while LECs are wrong that this conduct (mislabeled "arbitrage") would harm universal service (see *infra*), the LECs' own claims contradict the argument that the FCC's network element rules would eliminate the use of resale.

Further, as the FCC found (Pet. App. 245a-246a (¶ 334)), the greater competitive opportunities available to network element purchasers are accompanied by correspondingly greater risks. The purchaser of network elements runs the risk -- unlike a reseller -- that there will be insufficient customer demand for it to recoup its costs. A reseller purchases only the services actually used by its customer, and at a discounted rate structure that mirrors the rate structure that local services customers pay. Its profit margin, if any, is thus completely predictable in advance, and not dependent on the usage patterns of its customers.

An entrant that provides service through network elements, by contrast, has no predictable margin at all. First, the loop, the network interface device and portions of the switching network element are dedicated facilities for which LECs charge a flat rate that does not vary with the customer's usage. See, *e.g.*, 47 C.F.R. § 51.509 (a,b) (Pet. App. 312a-313a).[9] Recovery of that cost, and any profit, will depend on the new entrant's stimulating the customer's usage across the range of services the elements can provide -- which itself justifies the congressional decision to give network element purchasers (like firms who construct their own facilities) more latitude than resellers to engage in joint marketing of local and long distance service. See § 271(e)(1). In this regard, the LECs' assertion (Bell Atl. Br. 62) that these flat-rated elements need not actually be purchased by the new entrant until "a customer switches providers" is true but irrelevant. The costs -- like the costs of the additional internal systems that will have to be developed in order to provide exchange access services -- will still need to be recovered, and there is no guarantee they will be.

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[9] These FCC pricing rules were vacated by the Eighth Circuit on jurisdictional grounds, but the subsequent State rules do not differ from the FCC rules on this point.

The differences between the costs and risks of resale of LEC retail service and use of combinations of network elements is dramatically illustrated by the increasingly commonplace phenomenon of customers using on-line services (like America Online) or accessing the Internet. They do so by placing local telephone calls for which there is no additional usage or other charge, but which are included in the flat monthly service charge. If a new entrant provides service to heavy users of these services through resale of LEC services, the new entrant incurs no additional charge. By contrast, if a new entrant uses network elements, it incurs additional switching and other charges for each minute of usage -- and many customers spend scores of hours each month "surfing the Web."

Thus, in contrast to resellers of LECs' retail services, a network element purchaser can never avoid the fact that its profit or loss depends on customer usage volumes and usage patterns. Indeed, that was precisely the point made by AT&T's President in the remarks that the LEC briefs mischaracterize. See Bell Atl. Br. 52; GTE Br. 21; Ameritech Br. 24, 28. He did not say that network elements enable new entrants to obtain the "same services" at a higher "effective discount." Ameritech Br. 28. To the contrary, he stated that AT&T's "cost of goods sold" by purchasing network elements is "slightly above" the cost of purchasing services for resale, but that, *assuming* long distance usage by the customer of at least $25 a month, that added cost could be offset by revenues that AT&T could obtain by using the facilities to provide exchange access services. J.A. 257-58. In other words, he noted that by assuming a certain risk that resellers do not assume, and incurring additional cost, AT&T might reap greater rewards through purchasing network elements than through resale -- the very point made by the FCC that the LECs refuse to acknowledge.

Indeed, AT&T's President significantly understated the added costs and risks that AT&T would incur as a purchaser of

network elements, for he addressed only the payments to LECs. By contrast, he did not discuss the separate payments that purchasers of network elements will have to make to support universal service (which will be made not to LECs, but to administrators of the new funds that will collect and distribute the new explicit subsidies). In this regard, because the current wholesale rates for resale reflect all subsidies that now exist and because the cost-based rates for network elements do not, any comparisons between the two sets of rates and the resulting differences in risks would be meaningless even if it were the case -- as it is not -- that cost-based rates for combinations of network elements often or even always could somehow be said to be more favorable than those for resale.

In short, it is not the case that network element competitors obtain "guaranteed profits," avoid "incurring any of the ongoing costs associated with maintaining a real telecommunications network (costs related to such obligations as testing and repairing facilities and maintaining network records)," or avoid "undertaking any business risk." Bell Atl. Br. 52. To the contrary, the costs of maintaining, testing, and repairing facilities are part of the "cost . . . of providing" the network element that are reflected in the prices paid by new entrants (§ 252(d)(1)), and users of combinations of network elements (like owners of facilities) incur costs and risks that resellers of retail services do not.

2. Allowing New Entrants To Use Combinations of Network Elements On Nondiscriminatory Terms Poses No Threat To Universal Service.

The LECs also defend their efforts to make combinations of network elements too costly or infeasible to use on the ground that such measures are necessary to protect "universal service." The costs of providing telephone service to some customers,

particularly those in rural areas, are higher than the costs of providing service to others, and the LECs have long claimed that they need to charge supracompetitive rates to those other customers in order to subsidize the provision of service at affordable rates to the rural and other high-cost customers. This claim has played a role throughout the industry's history in every debate over regulatory efforts to foster competitive entry into monopoly markets, for the LECs have consistently opposed such efforts on the ground that any such entry would allegedly disrupt this putative subsidy system and thus threaten universal service -- a generic claim that has consistently been disproved each time entry has then occurred.[10]

Here, the claim is particularly meritless. The very purpose of the competition that the 1996 Act authorized is to assure that firms compete solely on the basis of the costs and value of their services, so § 254 of the Act eliminates the very subsidy system that the LECs are trying to invoke to prevent competition on the merits. In light of § 254, the downward pressure that new entrants will be able to place on LEC rates through competition cannot threaten universal service, and will instead bring about the very benefits for consumers the Act was enacted to produce.

Nonetheless, the LECs claim that permitting access to network element combinations on the same terms as the LECs enjoy will produce "regulatory arbitrage" that will harm universal service by allowing new entrants to "avoid contributing to the universal service subsidies." U S WEST Br. 17. In particular, the LECs claim that new entrants will then provide service at competitive and cost-based rates to the

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[10] For example, the former Bell System repeatedly contended that competition in the long distance industry would destroy the subsidies that support universal service (as it obviously has not). *See, e.g.*, "An Unusual Obligation," Address by John DeButts, Chairman of the Board of AT&T, to NARUC Annual Convention (Sept. 30, 1973), quoted in full in *Southern Pac. Com. Co. v. American Tel. & Tel. Co.*, 556 F. Supp. 825, 894-902 (D.D.C. 1983).

"subsidizing" customers -- *i.e.*, those customers whom the LECs currently charge supracompetitive rates -- and thereby strip the LECs of their source of subsidy for the "subsidized" customers. Accordingly, despite the statutory ban on discrimination, the LECs claim that Congress intended both to preclude new entrants from obtaining access to combinations of network elements at the same economic cost and other terms as the LECs enjoy and to authorize LECs to impose artificial costs and service disruptions only on users of network elements. For that would, the LECs reason, force entities to provide service solely as resellers of LEC services and to pay the wholesale rates that are based on supracompetitive retail rates that allegedly are needed to support universal service.

This claim is a sham. First, it is contradicted by the LECs' startling assertions that the Congress that passed the 1996 Act decreed that local telephone networks are no longer natural monopolies and expected broadbased competitors with their own networks to develop quickly. U S WEST Br. 2-3. That is implausible, to say the least.[11] If it were so, however, it would simply demonstrate that Congress did not craft § 251, or any other portion of the Act, to protect the LECs' alleged inter-service subsidy system. Under the LECs' view, the facilities-based competitors that Congress "expected" would present precisely the same alleged "threat" to universal service as network-element-based competitors, but there would be no means of imposing artificial costs on them that would force them to become resellers. Indeed, the hypothetical new facilities-based competitors would, if anything, have a greater ability than a user of network elements to offer rates based on

[11] It would have been an extraordinary and ill-founded assumption, and the snippets from Committee reports and the floor statements the LECs cite for this proposition hardly reveal what Congress "expected" (U S WEST Br. 8 & n.4). The LECs are making the preposterous assertion that Congress could repeal the laws of economics.

the costs of providing service and to compete successfully with the LECs for the business of those customers the LECs presently overcharge. This underscores that the LECs' real quarrel is with the Act's requirements that network elements be available at their economic cost.

In all events, the LECs' claim is baseless with respect to either category of competitor. Section 254 invalidates the very system of inter-service subsidies that the LECs are purportedly seeking to protect. Specifically, § 254 requires that any implicit subsidies (*i.e.*, those embedded in the LECs' existing retail or other rates) are to be replaced by a new, explicit and separate government-administered "universal service fund." See Report and Order, *Federal-State Joint Board on Universal Service*, 12 F.C.C.R. 8776 (1997) ("*Universal Service Order*").

There are four separate aspects of this new regime that each refute the LECs' arguments. *First*, the LECs' repeated assertions that purchasers of network elements will "contribute nothing to universal service" are false. Compare GTE Br. 11, 21, 51; Bell Atl. Br. 51; U S WEST Br. 17. Network element purchasers will incur the same proportionate expenses of funding universal service as LECs (*Universal Service Order*, 12 F.C.C.R. at 9173-9179). They thus will contribute their "fair share" and have no unfair pricing advantage over the LECs. *Second*, when the LEC (and also any purchaser of network elements) provides service to rural or other customers at the "affordable" below-cost rates that are prescribed to protect universal service, the LEC or other carrier will be paid the full amount of the subsidy from the government administrated universal service fund. *See Universal Service Order*, 12 F.C.C.R. at 8861-70. Network element competition thus cannot threaten universal service by depriving LECs (or others) of sufficient source of subsidy.

Third, because the LECs' supracompetitive rates today far exceed what is necessary to recover their costs, to earn a reasonable profit, and to fund universal service, the competition from users of combinations of network elements will patently benefit consumers. Unlike resellers, users of network elements will not have their cost structure based on the LECs' rates and will be able to place substantial downward pressure on excessive rates. That cannot harm universal service, but that will help achieve the precise competitive benefits the Act was enacted to create: lower, competitive prices for consumers.[12] *Fourth*, if it were feasible, there would be nothing wrong with new entrants competing with the LECs by serving all customers whom LECs serve at below-cost rates through resale and serving all other customers through network elements. *Compare* Bell Atl. Br. 62-63. Because the new entrant would make universal service contributions to the fund when it used network elements and because the LEC would receive universal service subsidies from the fund when it served the below-cost customer, there would be no threat to universal service and also no advantage for the new entrant.

Ultimately, therefore, the LECs' entire argument is reduced to an alleged concern about the timing of § 254's implementation. While Congress sought to foster the most rapid possible implementation of interconnection arrangements under §§ 251-

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[12] The LECs incongruously rely on a statement in the House report that the resale rate "should reflect whether, and to what extent, the local dialtone service is subsidized by other services . . . or subsidized through explicit subsidies from a universal service fund." *See, e.g.*, Bell Atl. Br. 50 (citing H.R. Rep. No. 104-204, at 72 (1995)). However, the most this could establish is that, when a particular local service is subsidized, the resale rate for those customers must be based on the LECs' retail rate, for competition through resale would otherwise not be economically possible. By contrast, the House Report patently did not say or even imply that competitors should be able to compete for the business of the customers who do the *subsidizing* -- *i.e.*, those who presently pay rates that far exceed costs -- only through the resale under § 251(c)(4) that would protect the LECs' monopoly profits.

52, the Act did not require the FCC simultaneously to establish and implement all elements of the new universal service system, and the FCC maintained the existing support mechanisms for an interim period. In particular, some of those mechanisms will be maintained until January 1, 1999, at which time providers of interstate services will begin making the competitively neutral universal service payments. See *Universal Service Order*, 12 F.C.C.R. at 8889, 8927. Similarly, while States are permitted to require all carriers to make interim or permanent payments based on their revenues from intrastate services (*id.* at 8888-8889), neither the Act nor the FCC's current rules compel the States to establish any particular schedule. For this latter reason, the LECs claim that the absence of a fully implemented replacement universal service system could theoretically "persist indefinitely," and that § 251(c)(3) should be interpreted to preserve the pre-existing subsidy structure for funding universal service indefinitely. Bell Atl. Br. 49.

That is absurd. Congress evidently recognized what the FCC subsequently found, and what events have borne out: there is no prospect of the rapid and massive growth of local competition through network elements that would be required to place any pressure on universal service during that short interim period. See *Access Charge Reform*, 12 F.C.C.R. 10175, 10184 (1997). More fundamentally, even in the unlikely event that this finding proved incorrect, the FCC and the States could then provide adequate interim remedies. Yet the LECs' theory rests on the nonsensical assumption that the States who have historically protected universal service would then stand idle and permit "massive [upward] pressure on the rates of [rural and residential] customers" simply because States are not *mandated* to act by a particular time. Bell Atl. Br. 50.

Even the LECs do not take this possibility seriously, for they do not propose any transition plan to deal with this contingency. Instead, they seek to use a remote theoretical possibility of a

short-term problem permanently to distort the application of § 251(c)(3) and transform it into an indefinite barrier to the only form of competition that is now feasible on a widespread basis. Beyond that, the LECs' proposed "solution" is a classic blunderbuss, for the costs it would randomly add to a critical means of competitive entry are not remotely calculated to match any possible or imagined universal service shortfall. In short, the LECs' universal service claims provide no support for their proposed interpretation of § 251(c)(3). Rather, they could support, at most, the adoption of transitional measures under § 254 to protect against a highly improbable contingency.

3. If There Were A Congressional Objective To Promote Facilities-Based Competition, The FCC Rules Would Further It.

Finally, it is both misguided and ironic for the LECs to claim that artificial and discriminatory burdens must be imposed on users of combinations of network elements in order to further a claimed congressional objective of encouraging facilities-based competition. Congress plainly would have had no reason to seek to encourage the building of duplicate facilities that are not economic or that market forces and conditions otherwise would not permit. The Act evinces no such objective. Instead, it imposes separate requirements to facilitate three different modes of entry (§§ 251(c)(2-4)) while "neither explicitly nor implicitly express[ing] a preference" among them. Pet. App. 137-38a (¶ 12). The only way the LECs can argue otherwise is by stringing together trivial and out-of-context snippets of legislative history. See, *e.g.*, U S WEST Br. 8 n.4.

In all events, new entrants do not need incentives to choose their own facilities over the LECs'. No new entrant wants to be dependent on its dominant competitor, to have such diminished control over its own operations, and to assume all the litigation

and monitoring costs such a relationship entails. New entrants will therefore obtain their own network facilities wherever and to whatever extent they are economically and technologically feasible under actual market conditions -- and AT&T, MCI, and others are actively engaged in these very efforts.

Further, the LECs' position would not accelerate, but would undermine, the development of alternative networks, for allowing unrestricted use of combinations of network elements on the same terms as the LECs enjoy is an essential bridge to that outcome. In particular, it is only through purchasing and actually using network elements that the new entrant can determine the cost and usage volume of each component, obtain information (through its provision of originating and terminating access) concerning the volume of calls that are not only made by its customers but also received by them, and establish whether and when it is economical to substitute facilities of its own for the LEC's. The reseller, by contrast, obtains information only about the customer's outgoing long-distance calls, and virtually no information about its local usage or its incoming long-distance calls, and will have thus have much greater difficulty transitioning to using its own facilities. In short, whatever the sincerity of the LECs' new-found enthusiasm for facilities-based local competition, it affords no basis for their efforts to cripple § 251(c)(3).

B. The LECs' Specific Statutory Claims Are Meritless.

Against this background, it is scarcely surprising that the terms of the Act squarely authorized the FCC to adopt rules that allow firms to obtain and use combinations of network elements on the same terms as the LEC enjoys. There is simply no textual or other basis for any of the LECs' attempts to cripple this mode of competitive entry.

1. The LECs' Arguments For Invalidating Rule 51.315(b) Are Meritless.

First, there is no substance to the LECs' attempts to defend the Eighth Circuit's decision to invalidate Rule 51.315(b). As explained in our opening brief (p. 38), § 251(c)(3)'s requirement that LECs provide access to "network *elements*" (in the plural) at any "technically feasible *point*" (in the singular) clearly establishes that new entrants can obtain access to network elements in combination. The Eighth Circuit not only disregarded this language, but rested its decision on a definition of "unbundled" that is foreclosed by the uniform dictionary, regulatory, and judicial definitions of the term. *Id.* at 38-42.

None of the LECs makes any serious attempt to reconcile the Eighth Circuit's holding with § 251(c)(3)'s use of the singular and the plural.[13] Nor do they cite a single instance in which anyone has adopted the Eighth Circuit's definition of the term "unbundled." GTE states (p. 67) that "even in the antitrust and related contexts" which petitioners cited, "unbundling" meant "requiring a firm to provide goods on a separated basis." But that is true only in a sense that sharply distinguishes it from the result the LECs seek here: firms were required to "separate[]" goods only when the customer so requested. As the decisions cited in petitioners' opening briefs establish, "unbundling," there

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[13] The only LEC brief that even addresses this language is Bell Atlantic's, and it tries to brush it aside in a footnote (p. 58 n.31). It states that a new entrant could somehow receive access to all physically separated elements in a single collocation cage in the LEC's central office. That is both wrong and irrelevant. It is wrong because not all the elements are even located in the central office; the network interface device, for example, is located at the customer's premises. J.A. 72, 75-76 (¶ 380, 392). It is irrelevant because, even if all the elements could somehow be made available in one *place*, as long as they are separated from one another the new entrant will still obtain access to them at multiple *points* rather than at a single point.

as here, meant giving the customer that option, not ripping combinations apart against its will in order to raise its costs.[14]

The principal focus of the LECs' argument is the second sentence of § 251(c)(3). As we demonstrated in our opening brief, it was plainly reasonable for the FCC to conclude that a LEC would violate the first sentence's command that network elements be provided through "nondiscriminatory access" and on "nondiscriminatory" "terms" if the LEC separated elements that it accessed for itself in combined form -- because then the new entrant would incur costs to provide service "that incumbent LECs would not incur" to provide the same service. AT&T Br. 36 (citing *Local Competition*, 12 F.C.C.R. 12460, 12486, ¶ 44 (1997)). The duty imposed on LECs by the second sentence is an additional obligation that applies in those circumstances in which they may lawfully separate elements, either because they are requested to do so by the new entrant or because they separate the elements when they access the elements themselves. LECs are here obliged to provide the elements "in a manner that allows requesting carriers to combine [them]." *Id.*, at 43-46.

The LECs contend, however, that the second sentence establishes not an additional duty, but a limitation on the nondiscrimination duty imposed by the first sentence. *See* Bell Atl. Br. 55-56; GTE Br. 70. But the only way they can make that argument is by rewriting the statute. Bell Atlantic thus describes § 251(c)(3) as saying "in no uncertain terms" that

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[14] For the same reason, the LECs' citations (*e.g.*, U S WEST, Br. 51-52) to passages addressing how network elements could be separated if the customers so requested are obviously irrelevant to whether § 251(c)(3) permits such separation in the absence of such requests. And it is particularly odd that GTE would claim that the FCC has "repeatedly" used "unbundling" to mean "physically separate[d]," and then cite only a single FCC order that was issued after the Eighth Circuit's decision and that sought, as the FCC was then required, to apply that decision. *See* GTE Br. 68 & n.24.

LECs must provide access to network elements "*only* 'in a manner that allows requesting carriers'" to combine them (emphasis added). See also GTE Br. 66 (same). But the word "only" is Bell Atlantic's and GTE's contribution, not the statute's. And it is precisely because this word is absent from the second sentence of § 251(c)(3) that it can only naturally be read to impose an additional obligation and not to limit the duty imposed by the first sentence.

The LECs also claim that, even apart from the second sentence, the FCC misconstrued the nondiscrimination requirement of the first sentence when it concluded that a LEC engages in unlawful discrimination when it insists upon disconnecting elements for new entrants that the LEC accesses for itself on a combined basis. According to the LECs, because the LECs at some point in the past had to combine their elements to build their networks, requiring competitors to connect the network elements they purchase merely puts the LECs and their competitors on an equal footing -- with neither having an "inherent cost advantage" over the other. Bell Atl. Br. 56; U S WEST Br. 52.

This is nonsense, First, LECs are not placing their competitors on an equal footing, for any customer that signs up with a LEC competitor will experience a service outage during the period of time before elements are reconnected and thus virtually no customers will switch away from the LEC. Second, LECs are entitled to recover all the costs of furnishing network elements, so their prices for combinations of network elements can and should include the economic costs of combining them. There is thus no "cost advantage" for the new entrant when the LEC refrains from ripping the elements apart.

Third, by contrast, if the LEC disconnects the elements -- even if it were then to "back out" the costs of combining network elements from the network element price -- it creates

for itself an insurmountable and discriminatory cost advantage by imposing added costs on the new entrant that the LEC has never incurred. In this regard, it is no answer to say that the LEC at one point built its network and combined its elements so its competitor can too; that is like saying that the new entrant should build its own loops, switches, and other facilities because the LEC once did so. The whole theory of the Act is that the LECs' monopoly customer volumes create for them enormous economies of scale. Those economies are what previously made competition with the LECs impossible because the LECs' costs would always be lower than any new entrant's. Indeed, the LECs built their networks at a time when they had monopolies that were guaranteed by law, when all customers were theirs as a matter of right, and when any reasonable expenditure they made on their networks would be included in their rate base and recovered from their captive customers. Congress sought in § 251(c)(3) to overcome this otherwise dispositive obstacle to competition by requiring that those economies be "shared with entrants." Pet. App. 137a (¶ 11). But the LECs would now require new entrants, with initially only a fraction of the LECs' customers, to reproduce the LECs' prior network-building activities and to incur the labor and other costs to wire the LECs' facilities on a customer-by-customer basis in order to compete. That would impose discriminatory costs on the new entrants that would far exceed any per-customer costs the LECs either incur today to provide service to a new customer, or incurred in the past when their networks were constructed. It would further assure that no competition to their monopolies can arise.

2. The LECs' Arguments For Imposing a Facilities-Ownership Requirement Are Meritless.

Next, the LECs have cross-petitioned on a claim that the Eighth Circuit rejected: that only competitors with some local

exchange facilities of their own should be permitted to provide service through network elements under § 251(c)(3). But this claim rests only on the "policy" arguments that are refuted above. See *supra* pp. 19-33. Further, there are two additional reasons that this claim is meritless.

First, it is contrary to the statute's text. The Eighth Circuit was correct in concluding that "the plain language of Section 251(c)(3) indicates that a requesting carrier may achieve the capability to provide telecommunications services completely through access to the unbundled elements of an incumbent LEC's network." Pet. App. 55a. The Act's interconnection provision -- § 251(c)(2) -- *does* require that the competitor own or lease facilities, for it requires interconnection "for the facilities and equipment of any requesting telecommunications carrier." § 251(c)(2). By contrast, "[n]othing in [§ 251(c)(3)] requires a competing carrier to own or control some portion of a telecommunications network" (Pet. App. 55a) before being permitted to purchase network elements. Indeed, § 251(c)(3) affirmatively precludes such a requirement. In contrast to the Act's "interconnection" provision, § 251(c)(3) requires LECs to provide network elements to "*any* requesting telecommunications carrier," not just to carriers that have already obtained local exchange facilities. (emphasis added) Further, the Act defines "telecommunications carrier" as "any provider of telecommunications services" (§ 153(44)), and in turn defines "telecommunications services" as "the offering of telecommunications for a fee directly to the public . . . *regardless* of the facilities used." § 153(46) (emphasis added). The right to purchase network elements thus extends to all competitors irrespective of whether they provide service through their own facilities or the LEC's facilities.

The LECs ignore this language, and rely instead on § 251(c)(3)'s requirement that access to network elements be provided "at any technically feasible point." *See, e.g.*, Bell Atl.

Br. 58. Their argument is that if a competitor does not have some local exchange facilities of its own, there is no "point" at which it accesses the LEC's network elements.

That claim is baseless, for new entrants without routing and transmission facilities still use "technically feasible point[s]" of access to employ the LEC's network elements. In particular, such new entrants interconnect and obtain access through the LEC's operations support systems ("OSS"). These are the systems that control the ordering, provisioning, operations and maintenance of the other network elements, and all carriers that use LEC network elements, including carriers that provide service exclusively through LEC network elements, need to access the LEC's OSS in order to use its other network elements. J.A. 116-18 (¶ 516-518). The FCC has therefore directed that BOCs, and all LECs, must provide "a point of interface (or 'gateway') for the competing carrier's own internal operations support systems to interconnect with the BOC."[15]

Thus, for example, a new entrant that purchases access to the LEC's switching element to serve a customer uses that OSS interface between itself and the LEC to add or remove calling features -- such as Call Waiting or Caller ID -- to or from its customer's line by sending software instructions through electronic and physical connections to the switch. Similarly, a new entrant will use its OSS interface to perform direct electronic or automatic testing of the loop if the customer reports an outage. Indeed, because it is generally through these

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[15] See *Ameritech Michigan Order*, 12 F.C.C.R. 20543, 20615 (1997). The LECs challenge in this case the FCC's classification of OSS as a network element. While that challenge is meritless, *see infra* pp. 44-48, it is irrelevant to the issue presented here. OSS interfaces would be a point of access to other network elements even if the OSS were not itself a network element. J.A. 117-18 (¶ 517) ("nondiscriminatory access to the functions of operations support systems" is "a 'term or condition' of unbundling other network elements under section 251(c)(3)").

interfaces that the new entrant is able to direct the operations of the network elements it accesses, the FCC has devoted particular attention to specifying in great detail what LECs must do to assure that proper access through OSS is provided.[16]

Second, as the FCC found, the LECs' proposed restriction on the purchase of network elements could not rationally be administered. If the FCC simply required new entrants to own some facility, no matter how trivial in size or scope, the requirement would be "so easy to meet it would ultimately be meaningless." Pet. App. 248a (¶ 339). On the other hand, if the FCC required a specific level of investment in particular facilities, the statute would provide no guidance on what that level should be. And any such requirement, in addition to being inherently arbitrary, would have the additional adverse effect of "creating incentives to build inefficient network architectures that respond not to marketplace factors, but to regulation." *Id.* The LECs do not attempt to refute, much less acknowledge, this ground for the FCC's decision.

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[16] *See, e.g.*, *Ameritech Michigan Order*, 12 F.C.C.R. at 20617-18:

> A BOC also is obligated to provide competing carriers with the specifications necessary to instruct competing carriers on how to modify or design their systems in a manner that will enable them to communicate with the BOC's legacy systems and any interfaces utilized by the BOC for such access. The BOC must provide competing carriers with all of the information necessary to format and process their electronic requests so that these requests flow through the interfaces, the transmission links, and into the legacy systems as quickly and efficiently as possible. In addition, the BOC must disclose to competing carriers any internal "business rules," including information concerning the ordering codes that a BOC uses that competing carriers need to place orders through the system efficiently. Finally, the BOC must ensure that its operations support systems are designed to accommodate both current demand and projected demand of competing carriers for access to OSS functions.

Indeed, the difficulties of administering the LECs' proposed extrastatutory restriction is illustrated by the LECs' own conduct. For example, contrary to the LECs' claims, AT&T's entry strategy does not involve purchasing from the LECs "*all* the network elements needed to replicate [the LEC's] service." Bell Atl. Br. 52. While AT&T's entry plans vary in different areas of the country depending on market and other conditions, at a minimum AT&T would use its own operator service facilities in combination with LEC network elements, rather than purchasing access to that element from the LECs, for AT&T believes it can thereby provide more competitive service at higher quality and efficiency. Such an entry strategy would comport with all the LECs' arguments here, for AT&T would be contributing network facilities of its own that would interconnect with the LECs' facilities at a "technically feasible point" even under the LECs' restrictive understanding of that term. Yet the LECs have claimed that operator service facilities should not be deemed a sufficient contribution of AT&T's own facilities -- because permitting their proposed restriction to be met in that way would not sufficiently inhibit its entry. This just underscores how manipulable, unmanageable, and arbitrary the LECs' proposed restriction would be.

Beyond that, AT&T will use its own switches to serve virtually all large business customers. It is also seeking to invest more than $10 billion to obtain other local switches and transmission facilities to serve business customers and multi-dwelling units in numerous cities. It will have to make substantial investments in backoffice and other facilities to use combinations of network elements to serve the residential or other customers that it intends initially to serve through combinations of LEC network elements (and its own operator systems), and will deploy other facilities to serve these customers whenever feasible. Apart from the "policy" arguments that are refuted above, there is no statutory or other basis for deeming *any* of the foregoing investments to be

insufficient to entitle a carrier to use combinations of network elements to serve any customers. This competition could only result in the imposition of some competitive pressure on LECs' monopoly prices in the time before additional facilities are deployed.

3. The FCC Properly Designated Network Elements.

The LECs further challenge the FCC's decisions defining several individual network elements, as well as one aspect of the standard it used in making those determinations. The Eighth Circuit properly rejected each of these claims.

a. The Section 251(d)(2) Factors. Section 251(d)(2) sets forth two factors that the FCC must, "at a minimum," "consider" in "determining what network elements should be made available": (A) if the element is "proprietary," whether access to it is "necessary," and (B) if the element is not proprietary, whether the failure to provide access will "impair" a requesting carrier's "ability . . . to provide the services that it seeks to offer." § 251(d)(2). However, the LECs contend that these terms codify the "essential facilities" doctrine of the antitrust laws (Bell Atl. Br. 67; U S WEST Br. 33-34), and that the FCC acted unreasonably when it held that its application of these factors would focus on determining whether a new entrant that is denied a network element can obtain the same functionality from another element within the LEC's network, rather than examining its availability from other sources.

The FCC's application of these factors was manifestly reasonable. First, § 251(d)(2) plainly does not codify the "essential facilities" doctrine. If Congress had wished to do so, it could easily have said so (or used equivalent terms and concepts): *e.g.*, by providing that "the claimed input must be essential to the plaintiff's survival in the market." 3A Phillip E.

Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 773b, at 202 (revised ed. 1996). Instead, it defined "network element" broadly to encompass any "facility or equipment used in the provision of a telecommunications service." § 153(29). It then imposed no limits on the elements that the FCC could define, but merely directed the FCC to "consider" (1) whether the unavailability of nonproprietary facilities would "impair" any competing carrier's ability to provide a service and (2) whether availability of a "proprietary" facility would be "necessary." The FCC reasonably defined "impair" to mean that the failure to declare a LEC facility to be a network element would lower the quality or increase the costs of any competitor's service, and it reasonably defined "necessary" to mean that the element is a prerequisite to competition. J.A. 50-55 (¶¶ 282-287). The Eighth Circuit upheld these definitions, and they represent accepted meanings of these terms.

Further, § 252(d)(2) had not "forbidden" anything (compare GTE Br. 62), and the FCC patently did not violate its provisions by declining to consider whether network elements could be independently built or obtained. The economic barriers that enabled LECs to maintain their monopolies arose not because duplication of their networks is physically impossible, but rather because no new entrant has the traffic volumes that would enable it economically to duplicate the facilities that the LEC controls. That is why the Act requires LECs to share those economies with new entrants. By the same token, if new entrants could generally obtain local loops, switches, or other functionalities more efficiently from sources other than the LEC -- and there is no serious claim that they

now could[17] -- the FCC reasonably concluded that the new entrant would do so.

b. Operations Support Systems ("OSS"). OSS are the databases and associated hardware and software that the LECs use, among other things, to input orders from customers, to assign telephone numbers, to track the facilities that provide customers with service, to test and coordinate maintenance of those facilities, and to convert the recorded customer usage information into bills. They are an essential part of providing telecommunications services, and are used by LECs in filling orders placed by new entrants for network elements as well as services to be resold.

When a customer moves into a new home and calls up the incumbent LEC to order phone service, the sales representative that answers the call can access the OSS immediately to obtain the necessary information, and to program the network to provide service, through a computer terminal on his or her desk. For example, the sales representative will use that terminal to (1) verify the customer's location on the telephone network, (2) assign the customer a telephone number, (3) assign the particular facilities that will be used to provide service to that customer, and (4) program the switch in the telephone network to provide whatever special features, such as Call Waiting, the customer requests. If the customer later calls to complain of a service outage, a different representative can access OSS to conduct an automated test of the customer's line, and, if necessary, to program into the maintenance schedule a visit to the customer's home. Many of these systems are thus connected electronically to the facilities that route calls within

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[17] For example, U S WEST states (p. 9) that switches can be easily built. But the FCC found -- and U S WEST's FCC comments did not dispute -- that the failure to provide the switch as a network element would erect a substantial "entry barrier." J.A. 85-86 (¶ 411).

the network, and allow the LEC representative to program or test those facilities with a few keystrokes. These LEC personnel can thereby confirm that service has been turned on, give the new customer a telephone number, or tell the customer when a service visit will be made, in the same telephone call in which the customer first contacts them.

When a new entrant is providing a customer with service through network elements or resale, the incumbent LEC still owns and controls access to the underlying facilities. Thus, a competitor cannot advise the customer of his or her new telephone number, commit to a schedule for providing or repairing a service, or even know which specific facilities are serving that customer until it first accesses the LEC system and obtains the necessary information. Nor can the customer receive service unless and until someone inputs the customer's order into the LEC's systems.

Before the FCC, the LECs did not deny that competitors must have access to this information and the ability to send orders and other instructions to the LEC. But they contended that they should be able to preclude competitors from connecting to the LEC systems electronically, as the LECs themselves do, and should be free to use far slower and more error-prone methods of transmission, such as facsimiles, mail, and hand-deliveries -- at which point the LECs themselves, at whatever schedule they chose, would key in the orders and requests for information to their systems. J.A. 113 (¶ 506). The FCC rejected this claim. It held that LECs must give competitors "nondiscriminatory" access to the critical information in those systems and to the ability to input instructions to the LEC facilities through those systems. If LEC sales representatives can access these systems electronically and provide immediate information to customers during the initial customer contact, competitors must have the same electronic access so that their sales representatives can provide the same information to their customers. *Id.*, ¶ 523.

If, by contrast, customers had to wait longer when dealing with competitive carriers than with LECs -- hours or days as opposed to minutes -- the LECs would have an insurmountable competitive advantage. The FCC thus concluded that the LECs' control over the essential ordering, provisioning and maintenance systems is as significant a "barrier to entry" as their control over the remainder of their networks (*id.*, ¶ 516); that nondiscriminatory access to these systems is "vital to creating opportunities for meaningful competition" (*id.*, ¶ 518); and that without such access "competing carriers will be severely disadvantaged, if not precluded altogether, from fairly competing" (*id.*). J.A. 116-18.

The FCC found that nondiscriminatory access to OSS was required on three independent grounds: (1) that the systems are within the definition of "network element" because they are "databases" or "facilit[ies] . . . used in the provision of a telecommunications service" (see § 153(29)); (2) that the systems are within the definition of "network element" because the information they contain is "information sufficient for billing and collection or used in the transmission, routing, or other provision of a telecommunications service" (*id.*); and (3) that nondiscriminatory access to these systems is necessary to the statutory requirement that LECs provide nondiscriminatory access to *other* network elements or to services for resale. *Id.*, ¶ 517. J.A. 117-18.

The LECs contend that the FCC's interpretation of the statutory term "network element" to include OSS was unreasonable under *Chevron*. Even if that were so, they would have no valid claim, for that challenges only the first two grounds for the FCC's decision. The LECs do not address, much less refute, the third independent ground on which the FCC relied, which does not depend upon whether OSS are

classified as network elements.[18] Nor would it suffice if they address the issue for the first time in their reply brief, for the only claims they raised in the Eighth Circuit and the only questions presented and discussed in their cross-petitions was whether OSS was properly defined as a "network element."

Moreover, even if the LECs' claim were not foreclosed by this independent ground, their claim is meritless. Its basis is the LECs' assertion that network elements are limited to parts of the "call-routing network" (GTE Br. 58) that facilitate "the transmission of calls" (Bell Atl. Br. 70). That assertion is wrong, and would be irrelevant even if it were right. The statutory definition rejects the notion that "network elements" are limited to call delivery and transmission. To the contrary, they include all facilities and equipment "used in the *provision* of a telecommunications *service*" (§ 153(29) (emphasis added)), and the statute defines "telecommunications service" as not only transmission but also "the *offering* of telecommunications for a fee directly to the public." § 153(46) (emphasis added). The breadth of this definition was deliberate, for Congress limited other statutory terms to "transmission" and "routing" where that was its intent.[19] Further, if the matter were not already abundantly clear, the statutory definition also expressly includes among its examples "databases" and "information sufficient for

[18] Indeed, that ground is irrefutable. The FCC has held, in a rule no party has ever challenged (47 C.F.R. § 51.311(b)), that "nondiscrimination" requires that the quality of access that the LEC provides to new entrants be at least equal to the quality of access the LEC provides to itself. If it takes longer for a LEC to supply access to a network element or a service to be resold, or to repair it, when it is supplied on behalf of a new entrant's customers than when it is supplied on behalf of its own customers -- as it will if the LEC does not provide nondiscriminatory access to its OSS -- then the LEC has not complied with the nondiscrimination requirement for that element or service.

[19] *E.g.*, § 153(43) (defining "telecommunications" as limited to "transmission"); § 251(c)(2) (duty to interconnect "for the transmission and routing of telephone exchange service").

billing and collection or used in the transmission, routing, or other provision of a telecommunications service." Finally, OSS would be a network element even under the LECs' proposed definition, for OSS controls the assignment, tracking, maintenance, and repair of call-routing facilities, and are certainly "part of the call-routing network." GTE Br. 58.

The LECs also assert that OSS are their "business skills" (GTE, p. 59) and are "backroom functions that any new competitor could reasonably perform for itself." US WEST, p. 37; *see id.*, p. 38 (competitors "can write or buy software as easily as the incumbent can"). But OSS are not software systems used to track marketing performance, administer pension benefits, or maintain personnel records. They are the systems used to order and repair the very facilities and services to which the LEC is required to grant access. Nothing in the FCC's *First Report and Order* relieves new entrants of the need to build their own internal hardware and software systems to serve their customers. The only issue is whether those systems and the LECs' systems will be able to converse efficiently when the new entrants need information that resides exclusively in LEC databases, and when the new entrants need to place orders or issue other instructions to the LECs.

c. **Vertical Features.** The LECs also challenge the FCC's holding that the "switching element includes all vertical features that the switch is capable of providing." J.A. 87 (¶ 412). That holding was likewise a straightforward application of the statute. Specifically, special calling features such as Caller ID and Call Waiting are provided to customers through the operation of hardware and software that reside within the LECs' switches, just as basic calling capabilities are provided through switch hardware and software.

No one disputes that the switch facility is a network element, and the statutory definition of network element expressly states

that an element "includes" all "features, functions and capabilities" of the pertinent facility. § 153(29). There is no material difference in this respect between the switch features, functions, and capabilities that are used to provide dialtone and call routing, for example, and the switch features, functions, and capabilities that are used to provide Caller ID and Call Waiting -- and certainly no legal basis to exclude either when the switch is provided as a "network element." All are "features," "functions," and "capabilities" of the same switch.

d. Operator Service Facilities. The LECs' next challenge Rule 51.319(g), which provides that "operator service facilities" are network elements. These facilities are clearly "network elements" under § 153(29), for they are "equipment used in the provision of a telecommunications service." Indeed, they are part of the very "call-routing network" that the LECs erroneously contend is the sole repository of network elements (*see supra* p. 47), for these facilities are used to route calls.

GTE focuses (p. 57) on the fact that, in a minority of instances (most operator services, such as calling card services, are wholly automated) these facilities will connect a caller to live operators who will use the facilities to route calls. They contend that it is an "absurdity" to make "people" part of a network element. But all network elements require live persons to operate them.

Finally, the LECs contend that these facilities, and the vertical features discussed *supra*, are a "service" and should be made available only through resale. But the Act does not remotely draw the sharp distinction between "facilities" and "services" that the LECs suggest: that is why it provides that network elements include not only "facilities" but all their "capabilities" (which includes the services they can provide) (§ 153(29)), and why the competitive checklist applicable to the BOCs requires that they offer, for example, local loop facilities "unbundled

from local switching or other *services*" (§ 271(c)(2)(B)(iv) (emphasis added); *see also* § 271(c)(2)(B)(v-vi)). And the Eighth Circuit was surely correct in upholding as reasonable the FCC's conclusion that the fact that a functionality can be labeled a "service" does not mean that it is exempt from the requirement that it be made available as a network element, for under such a holding the LECs could "entirely evade the unbundling requirement in section 251(c)(3)" by choosing to market network elements as "services" to end users. J.A. 41 (¶ 263).

III. THE FCC's "MOST FAVORED NATION" RULE IS VALID.

In their opening briefs, Petitioners demonstrated that the FCC's "Most Favored Nation" rule correctly interprets § 252(i), and is at the very least reasonable. Remarkably, not one of the Respondents so much as acknowledges, much less responds to, the textual basis for the FCC's rule -- that § 252(i) draws a clear distinction between elements "provided *under* an agreement," which must be made available to others, and the "agreement" itself. Respondents' inability to demonstrate that Congress' language unambiguously forecloses the FCC's interpretation shows that the Eighth Circuit erroneously invalidated this rule.

CONCLUSION

For the foregoing reasons, the judgments of the court of appeals (1) holding that the FCC lacks jurisdiction over pricing and other intrastate local competition matters; (2) vacating 47 C.F.R. § 51.315(b); and (3) vacating the FCC's interpretation of 47 U.S.C. § 252(i) should be reversed, and the portions of the Eighth Circuit's decision vacating various unbundling rules under the wrong standard of review (AT&T Br. 32-34) should be vacated and remanded for reconsideration. In all other respects, the judgment should be affirmed.

Respectfully submitted,

MARK C. ROSENBLUM
ROY E. HOFFINGER
295 North Maple Avenue
Basking Ridge, NJ 07920
(908) 221-3539

DAVID W. CARPENTER*
PETER D. KEISLER
DANIEL MERON
SIDLEY & AUSTIN
One First National Plaza
Chicago, IL 60603
(312) 853-7237

Counsel for AT&T Corp.

DANA FRIX
SWIDLER & BERLIN
3000 K Street, NW
Suite 300
Washington, DC 20007
(202) 424-7500
Counsel for ACC Corp.

CHARLES H. HELEIN
ROBERT M. MCDOWELL
HARISHA J. BASTIAMPILLAI
HELEIN & ASSOCIATES, P.C.
8180 Greensboro Drive
Suite 700
McLean, Virginia 22102
(703) 714-1300
Counsel for America's Carriers Telecommunications Association

JAMES M. SMITH
Vice-President-Law and Public Policy
3000 K Street, NW
Suite 300
Washington, DC 20007

DANA FRIX
RUSSELL M. BLAU
SWIDLER & BERLIN
3000 K Street, NW
Suite 300
Washington, DC 20007
(202) 424-7500
Counsel for Excel Telecommunications, Inc.

JAMES R. JACKSON, JR.
GENERAL COMMUNICATIONS, INC.
2550 Denali Street
Suite 1000
Anchorage, AK 99503
(907) 265-5545
Counsel for General Communications, Inc.

GENEVIEVE MORELLI
1900 M Street, NW
Suite 800
Washington, DC 20036

ROBERT J. AAMOTH
EDWARD A. YORKGITIS, JR.
KELLEY DRYE & WARREN LLP
1200 19th Street, NW
Suite 500
Washington, DC 20036
(202) 955-9600

Counsel for Competitive Telecommunications Association

CHARLES C. HUNTER
CATHERINE M. HANNAN
HUNTER COMMUNICATIONS LAW GROUP, P.C.
1620 I Street, NW
Suite 701
Washington, DC 20006
(202) 293-2500

Counsel for Telecommunications Resellers Association

LEON M. KESTENBAUM
JAY C. KEITHLEY
H. RICHARD JUHNKE
1850 M Street, NW
11th Floor
Washington, DC 20036
(202) 828-7437

Counsel for Sprint Corporation

CATHERINE R. SLOAN
RICHARD L. FRUCHTERMAN, III
RICHARD S. WHITT
1120 Connecticut Avenue, NW
Suite 400
Washington, DC 20036
(202) 776-1550

Counsel for WorldCom, Inc.

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**Counsel of Record*